UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

DIANNE L. KELLEY, et al.,)
)
Plaintiffs,) No. C07-475MJP
)
v.)
)
MICROSOFT CORPORATION, a)
Washington corporation,)
)
Defendant.)
)

MOTION FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE MARSHA J. PECHMAN

January 22, 2009

APPEARANCES:

For the Plaintiff: Jeff Tilden
Mark Wilner
Jeff Thomas
Attorneys at Law

For the Defendant: Stephen Rummage
Charles Casper
Charles Wright
Attorneys at Law

THE CLERK: This is the matter of Dianne Kelley versus Microsoft Corporation, cause number C07-475. Counsel, for the record, please make an appearance.

MR. TILDEN: Jeff Tilden, your Honor, with the plaintiffs, with Jeff Thomas, Mark Wilner and Ian Birk.

MR. RUMMAGE: Steve Rummage, your Honor, on behalf of the defendant Microsoft Corporation.

MR. CASPER: Charles Casper on behalf of Microsoft.

MR. WRIGHT: Charles Wright on behalf of Microsoft, your Honor.

THE COURT: Well, gentlemen, it looks like you brought fan clubs. You should have received a series of questions that I posed to you that I would ask that you answer sometime during the course of your arguments. I have allotted you 30 minutes per side. We have two motions to deal with today, although I am a little mystified as to why it is two. It seems to me that the issues are the same, and I kept reading the same things over and over. Let's focus today -- I don't know if you want to take them separately or not. I really view them as the mirror image of the same issue. If you don't, please feel free to divide your time as you would like to do so.

Mr. Rummage, it is your motions.

MR. RUMMAGE: Thank you, your Honor. And actually we see it very much as your Honor does. We do see it essentially as two sides of the same coin. There are some nuances that are

different with respect to the summary judgment motion, which we will get into particularly when we get to the last issue.

Both of the motions grow out of your Honor's class certification ruling back in February of last year. At that time, as your Honor knows, the Court held that the plaintiffs could not establish causation in a deception based claim on a class wide basis, and denied certification on that theory. But instead allowed the plaintiffs to pursue what your Honor characterized as another possible theory. And that was the price inflation theory.

The Court acknowledged that most courts, perhaps even all other courts up to that time, had rejected that theory, but your Honor said, I am not persuaded that the Washington State Supreme Court would reject it, and so I will allow you to further develop the theory.

The Court then narrowed and limited, in the Court's words, the issues on the CPA price inflation theory to two. One was whether the Windows Vista Home Base Edition is fairly called Windows Vista; and the second issue was whether the Windows Vista Capable Marketing Program artificially inflated demand and prices on one subset of PCs, that is Windows Vista Capable but not Premium ready.

My argument this morning, your Honor, is going to be directed at both of those issues. I am going to spend most of my time, if your Honor will allow, talking about the demand and price

inflation issue. And I really have kind of two sub points on that.

We think the Court should decertify the class and grant summary judgment, first of all, because the plaintiffs have not produced that quantum of proof that they need to produce in order to establish that price inflation theory; and, second, because the plaintiffs essentially admit that they cannot show causation of the damages they seek on a class basis. And Washington law says they have to show causation of damages, not just injury.

And finally, your Honor, after talking about that I plan to spend my time talking about why Windows Vista Home Base is fairly called Windows Vista. And I do plan to answer all four of your Honor's questions, which I think actually have about ten questions embedded in them along the way.

First let me turn to that first point, and that is the quantum of proof that the plaintiffs have to produce in connection with this price inflation theory. And let me begin by observing that this price inflation theory comes from, derives from a principle that has been recognized in securities cases for roughly 30 years, and that is the fraud on the market theory.

The theory there is in an efficient market, that is a market that can absorb public information and reflect it, process it in the price of a security, in that instance in an efficient market if there is a lawsuit brought about a misstatement you don't need to show empirically reliance or causation because economics show

in those efficient markets that information is processed and immediately reflected in price. And so there is a price inflation that people can recover for in a securities case if they can show an efficient market. And there is a lot of litigation about what is an efficient market and what isn't. And that is often the threshold question in those kinds of cases.

Now, we have to the an expert declaration here from Dr. Paul Gompers from Harvard. And Dr. Gompers has testified in this case the market that is at issue here is not an efficient market. And Dr. Leffler agrees. What is the significance of that? The significance is that we cannot presume price inflation. As Dr. Gompers explains, in that situation price inflation has to be empirically proven. That is kind of the fundamental predicate we begin with here.

It is interesting that in the three or four paragraphs that Dr. Leffler, plaintiffs expert, devotes to responded to Dr. Gompers he does not take issue with that notion of empirical proof.

So that brings us to your Honor's first question, which is, what evidence is necessary to establish a price inflation theory of causation? Well, your Honor, there is case law on this. And we think it is pretty clear that the case law establishes that what is not enough is intuition, what is not enough is basic economic principles. Recent cases have so held.

What instead a plaintiff has to show is that empirically that

prices have been inflated, and inflated not just as to particular individuals or segments but across the class. Because if you can't show inflation across the class it is not a class action. And, finally, after you show the inflation you have to show that the alleged wrongdoing accounts for the inflation. In order to get a class certified you have to show that you can, through an established methodology, factor out all of the variables that might account for that price inflation other than the alleged wrongdoing.

Now, we are not pulling that out of thin air. As your Honor can see from the briefs there are recent case from the First, Second and Sixth Circuits standing for this proposition. A recent case from the Northern District of California, in which Dr. Leffler was the expert, standing for the same proposition. In three of those cases classes were either -- class certification was either reversed, in the First and Second Circuit, and in the Northern District of California the class was decertified. In the Sixth Circuit case summary judgment was granted against the class.

Now, the two cases that came down after your Honor's class certification ruling are the In Re New Motor Vehicles case and the McLaughlin case. In the In Re New Motor Vehicles case the allegation there that the plaintiffs made was that the car companies had restricted imports of lower priced Canadian cars, and by restricting the imports of lower priced Canadian cars they

were able to maintain prices on US cars. Not dissimilar to what the allegations are here.

There was an expert in that case who did a quantitative regression analysis to show the impact on price of the alleged restriction of the imports. Still that court said -- the First Circuit said, the expert couldn't, hadn't done enough to support class certification because he couldn't separate out lawful from unlawful effects.

What it said was this: "Plaintiffs seem to rely on an inference that any upward pressure on national pricing would necessarily raise the prices actually paid by individual consumers. There is intuitive appeal to this theory but intuitive appeal is not enough." And so it reversed.

And when it reversed it remanded and said, you can go back now and see if the expert really can do it, really can do an econometric study that separates out these variables, and if he can you can take another run at class certification. That case is good, your Honor, because it separates out what is good enough and what is not.

What the First Circuit said is, the theory isn't good enough, we need actuality; we need to see, especially in a novel theory like this, that you really can do what you say you can do.

The McLaughlin case out of the Second Circuit alleged that misstatements inflated the price of light cigarettes, that the cigarette companies overstated the benefits of light cigarettes.

Price inflation as a result.

Plaintiffs had experts. The experts did an econometric analysis. The experts did a consumer survey. The Second Circuit said, not good enough, because these plans by the experts don't separate out the variables that could account for the pricing of light cigarettes. Certification reversed. Not given another shot to do it.

In the JBDL versus Wyeth case, your Honor, involved price inflation with respect to a drug. Dr. Leffler appeared in that case and said, basic economic principles show that when Wyeth expanded its market share it used that to inflate prices. In that case, your Honor, there even was accepted evidence of price inflation, because they knew what Wyeth had done with the price of the drug. The court said, not good enough; too many alternative explanations for what might account for the price and you can't proceed to trial without those explanations being factored out, and it can't be done.

And finally, in the Methionine case, your Honor, Dr. Leffler gave Judge Breyer down in the Northern District of California a simple regression analysis. And Judge Breyer said, not good enough; I need a multiple regression analysis that factors out all of the factors. Why? Because it is a complex market with lots of sellers and lots of products.

So those are the cases, your Honor. And plaintiffs literally respond with nothing. They respond with no price inflation cases

where a plaintiff's expert is allowed to take a case either through certification or through the summary judgment process with the kind of ipse dixit that Dr. Leffler provides to the Court.

So that brings me to the Court's second question, which is, why should the Court pay attention to these cases. I am not sure the Court phrased it that way but that was the second question that was embedded in that question number one. Your Honor, we think the reason is clear. If your Honor recalls back to when we were arguing a year ago, at that time we explained to the Court that court after court actually had rejected the price inflation theory. So your Honor is treading on new ground. Because your Honor is treading on new ground we don't have any choice but to look at analogous areas of the law.

Furthermore, leaving aside what we conceptually think makes sense, the Washington Consumer Protection Act in RCW 19.86.920 says, "in construing the act courts", and I quote, "should be guided by final decisions of the federal courts interpreting the various federal statutes dealing with the same or similar matters."

Well, the cases that I have just cited to your Honor are all either antitrust or RICO case. The antitrust statutes, as your Honor knows, were the initial foundation for the Washington Consumer Protection Act. The RICO statute was based on the federal antitrust statute. All of those statutes require that to

prosecute a civil cause of action a plaintiff has to show injury to business or property, just like our CPA. And all of them allow recovery of actual damages, just like our CPA. So we are dealing with statutes that have the same general framework and the purpose of protecting the integrity of competition in the marketplace and they reach exactly the conclusion that we advocate here.

And finally, your Honor, I would say the other reason to follow them, perhaps the best, is they make sense. And the reason they make sense is this: When you are pursuing a price inflation claim it is a quantitative claim. It is a claim that there is increment in a price that reflects an economic addition to the price as a result of misconduct.

Because we are talking about prices we are talking about a data rich environment. We know what things sell for. We can get price lists. Especially now. We can get on the internet and see what things sold for in the past. And so in that data rich environment courts properly expect, especially in a case seeking literally billions of dollars, trebling, courts properly expect that experts are going to be able to mine that data and come up with answers.

Your Honor's next question embedded in that first one is: If the plaintiffs are relying on anecdotal evidence of price inflation do they have to isolate out the variables? Well, let me first question the premise of that, your Honor. Because in

fact there is no anecdotal evidence at all of price inflation here.

Let me explain what I mean by that. Dr. Leffler has a very specific theory, and it is set out in tab 4 of what we handed up. His theory that there are kind of three buckets of PCs in the marketplace. There is the non Windows Vista Capable bucket. Those are the really low end PCs. There is the Windows Vista Capable but not Premium ready PCs, which is the PCs that the class bought. And then the Premium ready PCs. So there are these three buckets. His theory is that there was increased demand and increased prices for this middle bucket, that is the class's PCs, but that there was decreased demand for the really good PCs, the Premium ready PCs, and therefore decreased prices and decreased prices for the low end, non Windows Vista Capable PCs.

Now, if we were expecting anecdotal evidence to support that theory we would expect to see some computer that the plaintiffs could hold up and say, this computer reflects Dr. Leffler's theory. It is a computer where either prices went up or prices were maintained and they fell into this category, or there were Premium ready PCs and we can show prices fell. But there is no anecdotal evidence of that at all.

Let's hypothesize that there were anecdotal evidence. Let's hypothesize that the plaintiffs could show that some PCs or some categories of PCs actually did have a price increase. Would we

still have to worry about variables? I think the answer is, your Honor, we would especially have to worry about variables. And the reason is that this case is different from any of the cases that we just described in a way that makes the proof of price inflation even more difficult than in McLaughlin, Wyeth or the New Motor Vehicles. Why? Because in those allegations the defendant inflated prices.

The allegation in this case is not that Microsoft inflated prices. The allegation is that Microsoft did something and that other participants in the market, that Microsoft bears no responsibility for, in turn increased prices.

There are dozens of PC OEMs out on the marketplace, your Honor. All of them have their own pricing strategies. All of them have their own model lineups. All of them have their own desires as to how they want to mix their sales, how much Premium ready they want to sell, how much non Vista Capable and how much Vista Capable they want to sell. All of them.

There are retailers out there. Thousands of retailers. Some are specialty high end catering to elites, who really want the highest end PCs. Some are mass marketers like Walmart. They all have different pricing strategies. There are different models of PCs. There is a long period of time that we have involved in this case.

For example, your Honor, Ms. Kelley says that she started shopping for her PC a year before she bought it, before the

Windows Vista Capable period began, bought it in November of 2006 when it was at the lowest price she ever saw, $200 off the marked price plus a free printer. Do we know whether there was an increment of price inflation in that PC that had been on the market for more than a year, and it was marked down to that extent in November of 2006? So that is a variable we would need to account for.

And I would also add, your Honor, when I was talking about retailers, the plaintiffs themselves presented evidence, and it is at Bates number 40427, that suggests that Walmart was taking delivery of Windows Vista Capable PCs but not allowing them to be labeled. And if that is the case, your Honor, they don't even have a class that includes those people. And we will never know. We will never know because we don't know which PCs bore labels and which PCs did not.

And so the bottom line, your Honor, is that there is a constellation of variables that one would have to take into account just to satisfy yourself that there is price inflation, let alone the question of what caused the price inflation.

So what does Dr. Leffler do? What does the plaintiffs' expert do to segregate out any of these variables? The short answer, your Honor, is nothing. And I mean literally nothing. He did not do a pricing analysis.

THE COURT: Mr. Rummage, you have to slow down. I can't get a good record on you when you talk that fast.

MR. RUMMAGE: My enthusiasm gets me carried away.

THE COURT: I am feeling the enthusiasm.

MR. RUMMAGE: That's why your Honor has to interrupt me every now and then.

The short answer, your Honor, is Dr. Leffler did nothing whatsoever. He didn't do a pricing analysis. He didn't do the rudimentary pricing analysis that one might expect. And that is simply to look at what a PC was selling for before the Windows Vista Capable period and what it was selling for after, and perhaps comparing it to one of the PCs in one of the other categories. Your Honor will remember he has the three buckets. These prices go down, the prices of the PCs in the middle go up. So we ought to see changes in the differentials between the PCs. He didn't even try.

Did he do a regression analysis? Well, we know that is what Judge Breyer expected in Methionine. We know that is what the experts did in McLaughlin and New Motor Vehicles. Dr. Leffler didn't try. He says, I can't do it. If you look at tabs 1, 2 and 5 we can see the examples in his testimony acknowledging that he didn't do it.

Did he do a consumer survey, which was done in the McLaughlin case, to see whether people really carried about these logos? He didn't do a consumer survey. Did he look at different OEMs and how the practices varied from OEM to OEM? He didn't. Did he look at any the retailers? He didn't. Did he look at how prices

vary over time? He didn't. Did the plaintiffs depose any of these people? They didn't.

As we sit here today we have literally no insight into the people who are accused of raising prices did. We have nothing. We have nothing to suggest what the OEMs and what the retailers did. And that we believe, your Honor, is a shortcoming under the prevailing case law means that your Honor should decertify the class and grant summary judgment.

Now, I might add, your Honor, I don't presume what any of this would show. I don't know. And it may even be, your Honor, that the plaintiffs did some of these studies and chose not to introduce the expert who did them. We will never know.

What we do know is that what they have come to the Court with is intuition and in general economic principles that courts repeatedly have rejected as the foundation for this kind of claim.

With that, your Honor, I want to turn to the second point. That point will answer your Honor's second question. That has to do with the inability of the plaintiffs to show causation of damages at all.

Now, before I get into that I think I need to spell out just for my own foundation what the plaintiffs damages theory is. They claim that Dr. Leffler's testimony establishes causation and injury. And the injury is every member of the class, every one, no matter whether they bought, where they bought, what they

bought had some increment, an unknown amount, of price inflation. And that really is his intuitive sense based on reading these documents.

The reality is that Dr. Leffler also says, I would be speculating if I tried to tell you how much. And that tells you we can't go to a jury with that theory because juries can't award damages that are based on speculation. And he acknowledges it would be.

So the plaintiffs do what I will call a bait and switch. They say, we are going to prove injury and causation using this harm, price inflation, and when we get to trial we want to prove our damages using a different harm, the expectation damages.

Now, as a matter of law, your Honor, they can't do that. They chide us for not relying on Washington cases but the reality is Washington law settles this issue. When one looks at Hangman's Ridge, the Supreme Court's opinion in Hangman's Ridge sets out the five elements of the Consumer Protection Act violation. One of those elements is causation.

When the Supreme Court starts applying the five elements to the facts in Hangman's Ridge here is what it says about causation: "Finally the causation element is missing. Even assuming the injury complained of had been established, there is no plausible link between the actions of the closing agent, the defendant and the alleged damages."

The same here, your Honor, even assuming injury there is no

causation that plaintiffs can show of the expectation damages that they seek to recover in the form of however much it cost to upgrade a PC from a non Premium ready PC to a Premium ready PC.

The reason we know that there is no class wide causation proof on that kind of expectation damage is that your Honor already held that a year ago. That is precisely what was brought before the Court in connection with the class certification motion. And your Honor said, because of the varying influences potentially on the class one couldn't show causation on a class wide basis on a deception type claim which would have as its end game the recovery of expectation damages.

So the bottom line is, we have already been past the point where we can talk about recovering expectation damages on a class basis. Your Honor has ruled, it is the law of the case and plaintiffs have not questioned it.

That brings us to your Honor's next question, which is, assuming that we have it right on the damages, can the Court cure this by bifurcating this case into liability and damages phases. I think the short answer to that, your Honor, is no. And the reason the answer is no goes back to the Ninth Circuit's opinion in the In Re Dalkon Shield case, back in 1982, still the leading case on this issue. In that case what the Court said, before you do a certification of a chunk of a case as a class action you have to be able to satisfy yourself that certifying that chunk is going to advance the ball towards a complete class recovery.

In this case, your Honor, you cannot possibly make that finding because, as we said a moment ago, there is a complete disconnect between the liability case they want to prove and the damages they want to recover. They want to try a liability case on the question of price inflation but they want to recover damages on the basis of expectation damages. And so going to trial on this price inflation theory is going to shed no light on whether they can recover an expectation damages recovery, which would require millions of individual trials to determine who expected what and why they expected it.

And indeed, your Honor, when you look at the cases that have addressed this very issue in this very context we are back to McLaughlin and In Re New Canadian Motor Vehicles. Because in both of those cases, after the circuit court reversed certification by the trial court because of the inadequacy of the plaintiff's proof, in both of those cases the plaintiff said, well, please let us at least go to trial on liability issues. And in each case the circuit court said no.

The First Circuit in particular noted the fact that the deficiency in the expert's proof, just like the deficiency in the expert's proof here, went to the question of causation. And without causation there is a liability problem. So in other words even if we bifurcate this into liability and damages there is still a fundamental, non class issue as to liability because the expert's inability to go to court and present a method of

determining class wide damages or injury, as the plaintiffs want to phrase it, factoring out all of the individual factors that could have affected prices. Prices set not by Microsoft, not by Microsoft, but by dozens of OEMs, thousands of retailers who are not in this courtroom today.

THE COURT: Mr. Rummage, is there conceivably another theory out there? If we are drawing from other arenas I have only seen this in patent cases. It would attach to the unjust enrichment that the value to the class is what Microsoft valued its advertising on. In other words, they stuck these logos on these machines or had the OEMs do so. If that was a deceptive act then the value of the advertising would set the floor for what it was worth.

MR. RUMMAGE: Here is the problem with that, your Honor. And it actually relates to an issue that I meant to talk about a little bit and didn't. One of the main problems with that, your Honor, is that when you say "the value of the advertising" is that we have to remind ourselves that what we are talking about here is not the Windows Vista Capable program generally, and we are not talking about advertising generally, we are talking about the plaintiffs claim with respect to a narrow subset of the Windows Vista Capable program, that is the non Premium ready PCs. And I know of no advertising of non Premium ready PCs, none, done by Microsoft.

When one looks at whatever marketing materials were

presented, whatever marketing programs were done, they were marketing programs with respect to a program that plaintiffs acknowledge was perfectly appropriate as to Premium ready PCs. There is no challenge as to Premium ready PCs.

When one looks at the marketing that was done on that, your Honor, one finds, contrary to what Dr. Leffler says, all of the efforts were being made to market not these window Vista Capable but not Premium ready PCs, instead they were being made to market the Premium ready PCs that are not in issue in this litigation, as Mr. Totton's declaration shows.

I think it is impractical approach, number one. It is an impractical approach, number two, that plaintiffs have never suggested, never suggested, to the Court. And, number three, your Honor, it seems to me that it is going to be fraught with the same sort of class issues in terms of determining individual advertising as to individual consumers.

What I mean by that is this: I didn't articulate that very well. Let's go back to the Walmart analogy a moment ago. This speaks to your Honor's point that Microsoft had people put stickers on PCs. Microsoft made it possible for people to put stickers on PCs. But as the very evidence that plaintiffs' cite shows, retailers could exercise their power to say, we don't want PCs with stickers. Plaintiffs' evidence says that Walmart did that. OEMs could exercise their authority to say, we don't want to put stickers on this PC because our pricing strategy and our

marketing strategy is to drive demand to our Premium ready PCs where we have a higher margin. There is no evidence on that.

There is still going to be that same issue if your Honor goes to the theory that your Honor just espoused. You are still going to have to figure out where did those advertising dollars go. Did they go with respect to PCs that actually were advertised as Windows Vista Capable but not Premium ready or not? The answer is, I think, it will vary from entity to entity, retailer to retailer, OEM to OEM, which is perhaps why the plaintiffs have never advocated the theory.

THE COURT: Mr. Rummage, what you are telling me is that if I assume that Microsoft for purposes of argument has done something deceptive by telling me that Vista Capable means that it will run everything, are you telling me the only way to get at this is one at a time, each individual plaintiff telling their personal story and getting their $400 back?

MR. RUMMAGE: I am going to start with the premise, your Honor, I don't think we did anything wrong. And that actually is the next problem I was going to argue. I understand I have to assume that. I can't let that assumption pass without comment.

If we assume that I think that is the outcome, your Honor. And I understand your Honor's hesitation with that. But the Second Circuit speaks directly to this issue, because the Second Circuit is dealing with the situation where the allegation is that the tobacco companies misstated the, quote, health benefits,

close quote, of light cigarettes. And the Second Circuit says, you know, that is a bad thing. And what we are talking about here is a bad social problem. We agree something has to be done about it. But you know what? We are not necessarily the forum for remedying every perceived social wrong. We have to follow the standards. And the standards, your Honor, lead ineluctably to that conclusion.

I don't think, your Honor -- I don't think your Honor should feel uncomfortable with that. And here is why: Because we know from the statistical evidence that has been presented to the Court that we are talking about a tiny, tiny fraction of people who arguably could have been affected, even if we were talking about actual deception, which we do not believe occurred. And so to say that we have on the one hand the choice of pursuing a defective class action that would involve millions and millions of people who, for all the evidence that is before the Court, never did have any expectation of getting anything other than what they got. Remember what that PC logo said. It said, "designed for Windows XP, Windows Vista Capable." And we know that most people buy those PCs with the expectation -- They are like me. I am never going to change out the operating system on my PC. I am going to dance with the OS that brung me. I am going to be there with the XP operating system. Experience shows that is what happens.

So if our choice is do we pursue a defective class action

with millions of people, even if plaintiffs are right, don't care, or do we say that those people who really do care will have to pursue their individual remedies. I think, your Honor, that the choice is clear. And it is clear I think not only as a matter of legal precedent but as a matter of judicial policy in terms of when the Court intervenes in disputes.

We are not supposed to through the class action device improve the situation of either party. And plainly, your Honor, if we allow plaintiff's to skate by with the kind of evidence they presented through Dr. Leffler we would improve their position.

Nothing illustrates that more clearly than Ms. Kelley's situation. Because remember Ms. Kelley testified, I didn't know what Windows Vista was; I didn't buy it with the expectation of getting Windows Vista; I didn't know there was a Windows Vista Capable program; I didn't know there was a sticker on my PC. And yet she comes into court and says to the Court, I've got an expert who says there was some increment of my PC price that was attributable to price inflation. It might be a nickel, it might be a buck, it might be ten bucks, but he says there is some increment. And so what I want the Court to do is I want Microsoft to buy me a new PC.

Their allegation is that though she paid $499 for a PC she had been shopping for for a year, we have to pay her $575 back, more than she paid for the PC, so that she can buy yet another PC

with Windows Vista on it, even know she had the option of buying Premium ready PCs back then and chose not to do it.

Now in that scenario, your Honor, I submit that the appropriate remedy is for Ms. Kelley, if she believes she has an individual cause of action, to pursue it, and not to sweep her into a class with that sort of, again, defective economic proof.

Now, if I may -- I don't know if I have already overstayed my welcome. I have two more questions of your Honor to answer, which I am happy to do, or I am happy to sit down, as your Honor pleases.

THE COURT: Quickly, Mr. Rummage.

MR. RUMMAGE: Okay. The two more questions that your Honor asked were these: First, does the development of Windows Vista to include Windows Vista Home Basic foreclose finding that Windows Vista Capable program had the capacity to deceive? And I think the shortest answer to that is yes.

The reason for the shortest answer is this: If Windows Vista Home Basic was Windows Vista then it was absolutely, categorically true to say that a PC that could run Windows Vista Home Basic could run Windows Vista.

Frankly, I thought that was what the Court was getting at when the Court said there are two questions, and one of them is, is Windows Vista Home Basic fairly called Windows Vista. I think we have shown, as a technical matter, and plaintiffs concede as a technical matter, it is part of the Windows Vista family.

Mr. Allchin, their expert, says it is common in the software industry to develop a robust, fully featured operating system or piece of software and then disable certain features to differentiate between SKUs or editions and to sell them at different price lines.

All that happened here was Microsoft chose to differentiate between Windows Vista Home Basic and Windows Vista Home Premium by the Aero user interface. It had ever right to do that and it did.

THE COURT: I think you may have misunderstood me, Mr. Rummage, in the way we set it out a year ago. I have never thought that Microsoft didn't have the power, authority, right to build as many different kinds of programs as they wish. The issue was the labeling, not what they can do.

MR. RUMMAGE: Fair enough. That goes to your Honor's next question, which was, isn't the issue whether the sticker is misleading. And I think the answer to that, your Honor, is that the plaintiffs have never claimed, never claimed, that the sticker standing on its own is misleading. The question is, what does it mean in the context -- what does it mean in the context of what was said about what Windows Vista meant and whether Windows Vista Aero was included in Windows Vista Premium.

THE COURT: I happen to have a little prior knowledge about how it is that Microsoft picked Vista as a name. I have that lawsuit too. The whole idea of seeing into the future, the

screens that fade away. You spent -- I can't remember exactly how much but lots of money to develop the name. You were trying to market something new and yet what you give the people with the Basic is the same old same old.

MR. RUMMAGE: Your Honor, with all due respect what your Honor just said there is not a shred of evidence to support that in the record. It is not the same old, same old. It is different computer code, it has completely different characteristics. That is not trivial. That is how operating systems are built, is with computer code.

THE COURT: That is not the part that is deceptive.

MR. RUMMAGE: I was going to say, what matters is -- because what matters, in terms of determining what deceptive is, is what do you tell people. Fair enough. It seems to me that we have to start with what do we tell people. And what I was struck by is this: The plaintiffs begin their response to our summary judgment motion with these words -- Characterization is cheap so I am going to read it. They begin with, "Microsoft promoted one feature of Vista above all others." I started to do my Mr. Tilden imitation. I won't do that. Read it in his voice. "It promoted one feature of Vista above all others, the new graphics comprising the elegant, new Aero user interface." That is the premise, we deceived people into thinking that was in Home Basic.

I would ask your Honor to open the oral arguments exhibit to

tab 7. That is the exhibit they cite for that. This is not what I am pulling out of thin air, this is the exhibit they cite, declaration of Mark Tindall, docket 93, Exhibit D. And your Honor will see that is a check box. And that the words "elegant Windows Aero user interface", which they quote in their brief, appear on a check box next to column labeled Home Basic, which could not more plainly show that Home Basic doesn't have that user interface. It plainly shows that Home Premium does. And then above that plainly tells people, for a better experience that come with the Premium editions, including the Windows Aero user interface, ask for Windows Vista Premium ready PCs.

Your Honor, the fact is when we look at everything that is in this record that Microsoft put out there, whether it was retailer materials attached to Mr. Tindall's declaration, whether it was his website, the get-ready website attached to the declaration, whether it is the press releases that accompanied these programs, every single one of them candidly, accurately stated, if you want the new Aero user interface get Premium ready. And, by the way, your Honor, said, we want you to buy Premium ready; we recommend it to you. Completely counter to the plaintiffs' entire theory of the case, that somehow we drove demand away from Premium ready towards window Vista Capable but not Premium ready PCs.

And so what I am waiting for, your Honor, and have been waiting for since the day that Mr. Tilden first held this document up in the courtroom, when we first came here on the

motion to dismiss, is the piece of evidence where during the class period Microsoft told class members that if you buy a Windows Vista Capable PC you will get Aero. To date we haven't seen it. And I don't think we will, your Honor, because the desire was to drive people towards buying the Premium ready PCs. That's where we will see the promotion directed.

All of the folderol about driving the market, increasing PC sales, of course. That was directed towards the effort to increase awareness and recommend -- was directed towards Premium ready PC, not the PCs of the class members.

I don't know if your Honor has any further questions. I am happy to stay up here as long as your Honor wants. I realize I have used my allotted 30 minutes. Unless your Honor has questions we would simply ask the Court decertify the class and grant summary judgment.

THE COURT: Thank you, Mr. Rummage. Mr. Tilden.

MR. TILDEN: Good morning, your Honor. I would like to start everywhere as once. And that won't work. So let me recite for the Court a handful of legal propositions we assert. Then I will talk some about the facts, and then we will talk more about the law. Unless the Court has anything you would like me to address directly right now?

THE COURT: Well, Mr. Tilden, I don't want to upset your flow. I mean, you have a lot of things to respond to but what Mr. Rummage is telling me, and it is starting to make me nervous

here, is the really good suit the one-on-one for false advertising. Have we tried to pound that peg into the wrong hole?

MR. TILDEN: That is certainly their argument. Let's begin this way.

THE COURT: Let me follow with Dr. Leffler. I read his materials and what is striking is that any professor teaching economics 101 could write that report.

MR. TILDEN: I think that is probably true.

THE COURT: I don't want to use the wrong phrase. I am saying where is the beef, where is the analysis here that goes from the general principles to the specifics, and what am I going to tell the jury is the formula they use to give us the damages?

MR. TILDEN: Surely. Let me try and list some propositions we believe and see if I can cover all of the Court's questions there. First, when you go through these cases, and we will do it in more detail in a second, especially the antitrust cases, you find they are, first, the results fact intensive as it ought to be. Second, most of those are expert/lawyer driven with an expert economist theory, maybe assembled with a lawyer. But the expert is the key part of the case that gets presented at trial. That is not us. The key part of our case that gets presented in trial is admissions in Microsoft documents. So we are factually distinct from really all of those.

We are going to the jury, if permitted, with Jim Allchin's

testimony. Dr. Leffler's expert testimony is far less critical to our case than the average economist is in these circumstances.

Leffler says, look, given the fact there are 310 million people in America, given the fact that it there are so many computers, that computers are separated between laptops and PCs, and this is where we were in the 2006/2007 time frame, if Microsoft slash Intel wanted to dump 19.4 million 915 computers on the market they could not have done it at the Vista Capable price.

That argument is, A, confirmed by our class representatives. B, it is confirmed by Microsoft's statements in the documents. C, it is confirmed by other statements in the documents that an expert can rely on. D, it is extraordinary common sense.

We will take you through -- They spent some time with our expert. We will talk some about theirs. We do not require, given the factual record we have here, extraordinary expert economist work. Dr. Leffler says what Dr. Hitt says, their Wharton economist, this cannot be done in any meaningful fashion.

I love the Canadian import litigation case. We will get to that. It is entirely an expert concoction. There may or may not have been a tort there but their only evidence of it is the expert report.

The court recites repeatedly that it is a novel theory. It is not clear a tort was committed at all. It would doubtless surprise, in a country or size as many vehicles on the road as we

have, a person in Corpus Christi that the car market in Duluth had inflated the price of the car he bought by a dollar.

When I read the Canadian import case my first reaction is, there is not a tort here, this shouldn't be a class, and it shouldn't be a case. We have got a different factual predicate. So that's the big Leffler issue.

On a handful of legal of legal -- And Hitt agrees, if we were here with a multiple regression analysis, which personally I think would smack of voodoo economics, Mr. Rummage would be up here with the voodoo economics cases saying, this cannot be done, it is voodoo economics.

He purports to tell us in an alternative universe what a given at Best Buy might have sold a computer for in March of 2006 in an advertising regime that didn't exist. I have a lot of sympathy for that argument Mr. Rummage would make but doesn't have to.

So we and their economist agree with this principle, that you can not meaningfully go back and quantify the average amount per customer of damage. In antitrust cases you must do it because the antitrust damages must tie directly to the antitrust injury in a way that Consumer Protection Act injuries need not. And we will talk about that in a second.

If the Court believes as part of a Consumer Protection Act claim we have to show the average amount of price inflation -- price maintenance really. They pass these off as Vista Capable.

Had they told the truth the price would have dropped. If the Court believes we have to show that delta, we can't do it. I want to be honest with you.

That is not our claim. Our claim instead is that when they dump 20 million of these on the market and call them a diamond and not cubic zirconium, they were able to sell them at diamond prices, and not whatever the other price would have been.

Let me show you a handful of documents.

THE COURT: How are you going to get that number, the difference between the diamond and the cubic zirconium?

MR. TILDEN: We are not going to get that number. We have a handful of remedies instead that we propose. One, none of the argument we have heard from Mr. Rummage addresses the unjust enrichment claim we have.

The best location of unjust enrichment class research is Section 10.3 of Newberg on Class Actions. Unjust enrichment is a perfectly legitimate class remedy. It is a clear way to identify the class damages. We have identified the damages. They have don't like the number. In that event it would be a court issue for the trier of fact, your Honor.

But we do not believe they have laid a glove on the unjust enrichment class analysis. We think the number is roughly $1.5 billion for a class. You can add it up. While we have a quarrel how large the class is, there is no quarrel what that number is. Now, they don't think it is the right number. But

there is no dispute what the number is.

THE COURT: How do you get that number, Mr. Tilden? What do you put --

MR. TILDEN: That is the total Microsoft income from the sale of Vista Capable computers.

THE COURT: Thank you.

MR. TILDEN: Microsoft says, in fairness to them they say, wait, wait, wait, the best case basis you are only entitled to our profit and not the entire revenue. I don't believe that is what unjust enrichment law says.

As a friend of mine here says, when you get caught cheating in high school and get and F you can't go in and argue, well, look, I really would have gotten a B if you had let me take the test, so I should only be dropped one letter and not five.

The question of what the exact unjust enrichment remedy is, is one that is not teed up for today. That is issue number one. We don't believe they have laid a glove on the unjust enrichment class, your Honor.

Issue number two. We plainly have a class for nominal damages and fees, although we don't have an interest in that.

Three. The Consumer Protection Act remedy itself. The Consumer Protection Act allows the Court on these facts to award either restitution or repair. And I have handed up a notebook. I would like to go to one of the inserts. These are in the left-hand side. About five pages in, your Honor, I have a chart

that looks like this.

The very best case here, and the only one you absolutely need to read, is the Allen case. In 1981 it went to the Court of Appeals. The trial court awarded a restitution and rescission remedy in a CPA case.

It went to the Court of Appeals, and the Court of Appeals said, wait a minute, that is not actual damages under the statute, and reversed.

It went up to the Supreme Court and nine to nothing, and in a very direct discussion the Supreme Court reversed the trial court.

We quote Allen two pages in at some length. I don't need to do it here. But they leave no doubt that the restitution and rescission -- In fact, there is a $250,000 trust fund the trial court created there. They leave no doubt in a unanimous opinion that this is a fair remedy.

We collect on the handout five cases that stand for the proposition that the causation of the CPA injury, while it is plainly an element of liability in a Consumer Protection Act case, that injury need not define the damages. So once we show that these people paid too much for their Vista Capable computers we can establish damages with anything proximately caused by that conduct. It doesn't have to be the actual delta between what the computers did sell for and what they would have sold for in some alternative universe.

The repair costs, unjust enrichment are both reasonable remedies, we believe, and they are both countenanced by these cases. They are both countenanced by the discussion in Newberg at Unjust Enrichment at 10.3.

THE COURT: You just said something, Mr. Tilden. You said "once we show that these people paid too much." Where do you get the "too much?"

MR. TILDEN: A bunch of places, your Honor. I have collected -- we have collected in this -- This is the greatest hits notebook for the Court. In the left hand jacket are some demonstratives like the ones we have looked at. In the right hand jacket in the back was a copy of the white paper, which was an exhibit we discuss in our briefing. In the core of the notebook, which are the seven tabs, are key documents organized by set. The plaintiffs-paid-too-much documents are generally in number seven.

When you look at those here are some things you find: One, Exhibit DD to my declaration are Sony documents. "Without Vista Capable messaging these computers will need to be discounted. We anticipate a financial impact in the three millions of dollars. Calling these Vista Capable has reincarnated these end-of-life computers." Sony documents.

Keep in mind, when we subpoena these people we don't get a lot of enthusiasm. Microsoft is an important person in their life. I don't know what happens when they get our subpoena, but

they don't call us; they call somebody over here. And I don't know what they tell them but "give 'em everything you've got" is not the message. It is very hard to obtain this information.

That is what we have from Sony. Office Max said, and this is Exhibit Y to my declaration, "we cleaned out old inventory without taking further discounts."

Document 25711. This is MS-KELL. "Comp USA and Circuit City are telling OEMs that non Vista Capable computers will get marked down.

Document 24864. "XP computers", which is what these really were, "were discounted after Vista released."

47095. "Vista Basic is not moving. Inventory rising. Accounted for 15 percent of sales versus 47 percent we predicted."

47095. Again, Comp USA and Costco are talking of returning the Basic SKU shop keeping unit. Basic was responsible for 68 percent of the projected Vista forecast.

That is one. We have documents in the record that tell us that this happened. Two, we know what Intel thought. Intel was banging the drum, screaming bloody murder, please allow these non WDDM 915 chips to be called Vista Capable.

A man named Will Poole at Microsoft in late January of 2006 finally cracked. This is tab 5 in the notebook. I have given them little tabs at the top. Renee James is a big wig at Intel who has been deposed. Intel is in Santa Clara. They are -- The

documentary record makes absolutely clear they are doing cartwheels in Santa Clara once Microsoft relaxes the requirement. "We are seriously confused. We believe that 915 is not Vista ready as it will never have WDDM drivers."

Let me footnote that if could, your Honor. We filed a summary judgment motion on this WDDM issue. Microsoft disagrees with the estimate. We believe the class is 19 million, and 13 million of them are not WDDM computers. They say the class is smaller, and the class of WDDM computers is smaller.

But the WDDM computers can never be made Vista Capable. You have to throw out your computer and go buy a new one. That is our claim with respect to the WDDM issue.

James says, "we believe that 915 is not Vista ready as it will never have WDDM drivers. We believed your Vista ready requirements doc said it had to be WDDM drivers to qualify for the program sticker." Which in fact it did.

If you turn a couple of pages further, three pages in, your Honor, and highlighted --

THE COURT: Three pages in on tab 5?

MR. TILDEN: Yes, three pages past what we were reading. It is the next page with the highlight. Again, "so Intel's exposure --"

THE COURT: I will read off this one.

MR. TILDEN: "So, Intel's exposure is $600 million." Further down, "here is how their potential costs could get into

the billions."

We have ironclad evidence that Intel was looking at significant write downs of the 915 chips in an amount of billions.

Your Honor fingered one additional piece of evidence here. The entire theory of Microsoft's defense here is that the Microsoft marketing program adds no value, the calling something Vista Capable did not make it more attractive. Professor Hitt argues, well, no doubt it makes it more attractive but the chip market is infinitely elastic, and if more people want more computers manufacturers will just create more computers at the same price. So increased advertising may increase the number of computers sold but it will not affect the price at which they are sold.

We know for a fact that is not true here. Intel was fazing out the 915 chip. They were not going to ramp up production of the 915 chip. These are all the 915 chips that the world was ever going to see. What they wanted to do was pass these off as Vista Capable and not as end-of-life chips.

I asked Professor Hitt directly on that issue. To his credit he stuck with his guns; if it is the case that calling something Windows Vista Capable doesn't make it more valuable then the reverse should be true too. And he stuck with it. This is page 40 of his deposition. I asked him first: All right. If calling it Vista Capable doesn't make it more valuable would

calling it not Vista Capable make it less valuable? This is question number one at the bottom of 40. And down here at line 17 on 41 he says, no, it wouldn't make it less valuable. That is obviously nonsense. If you put it in the store and said not Vista Capable the price would drop. But he is tied into this position by virtue of his claim that calling -- giving it an attribute didn't raise the price.

We pushed him. The next one. What if you call it Won't Run Aero, would you agree with me that would drop the price? No. The next page. Won't run Glass. Doesn't effect the price. Number four, not what Jim Allchin demonstrated at WinHEC 2005? Doesn't affect the price. These machines weren't Vista Capable for three years but we changed our mind last week and now they are? Wouldn't affect the price. Next, these are Vista Capable now but they won't be on February 2nd of 2007? Won't effect the price. Technical requirements were recently lowered to make this machine Vista Capable? He starts to hedge. He says, I don't know.

Obviously all those things would affect the price. Dr. Leffler says it would affect the price. Everyone in the courtroom knows it would affect the price. Anyone sitting in that box knows it affects the price. And they have an expert that says, no, it won't affect the price.

We have a boatload of concrete evidence in this case that does not exist if the antitrust cases that I don't want to

unfairly tag, but involved claims that are expert economist driven. Our case is driven by the documents we have gotten from Microsoft.

Let me, if I could, spend two minutes on the two cases that Mr. Rummage addressed most directly, because I love them. First McLaughlin. I am going to sound like someone that knows something about either class actions or RICO but I am not. I think McLaughlin would come out the other way today. I found that out reading the In Re Grand Theft Auto class action case they cited.

The Court observes this: "McLaughlin went off on the need to show individual reliance by every single person under the RICO statute." Something that your Honor held a year ago wouldn't be happening here. I didn't take strong issue with the ruling. In McLaughlin, unless it is RICO you have got to show individual reliance. If you can't do it, you lose. Fair to me.

In 2008 in Bridge v. Phoenix Bond and Indemnity Company, 128 Supreme Court 2131, the US Supreme Court ruled that you do not need to show individual reliance in a RICO case.

I think the McLaughlin decision would come down the other way today. I haven't looked to see what they are doing in the McLaughlin case, but the central predicate of that decision has evaporated.

Then we look at the In Re New Motor Vehicle case, which I was fascinated by only because the notion that there was a tort there

seemed so farfetched to me. They have got no evidence at all beyond an economist report.

So compare that to us. In both cases do we have an expert opinion that the price was impacted? You bet. Look at all those other things we have got that they don't have. I won't read them all. Party admission that the goal of the marketing program was to not stall sales. E-mail by the marketing director that nothing other than sales matters. Retailers expressed fear of markdowns without program. Retailer inventory sold out. It goes on and on.

The Canadian import litigation is a lawsuit -- I note that all that happened there was by a two to one vote they reversed the certification of the class. One judge believed that one expert report was enough to go forward on the face of really no facts whatsoever. We are not the Canadian import case. The documentary evidence that has been assembled here is of a quality that does not exist in any of the cases they have cited. One.

Two. The Consumer Protection Act here, and Allen is the very best case, does not require that the damages proven be the causation damages.

You see that most clearly actually in the pattern jury instructions. Injury is an element of liability, but that injury is not the damages measure. The pattern instruction on liability I think is 310.01. It lists the five elements in Hangman Ridge. One of them is injury. If you get past those five you get a

completely new instruction on damages. Allen says -- It is wide open territory.

THE COURT: Including nominal.

MR. TILDEN: Including nominal. Although we don't have any interest in that. They use the example of Ms. Kelley paying 400 something dollars for her computer and getting $500 back, a higher number. I don't have any problem with that at all.

Let me make a couple of arguments to the Court here. One, as it happens, a wonderful argument for that kind of relief started occurring -- we can take lawyer notice of the fact that the Court, Mr. Rummage and I are all about the same age. In the late '70s, I think the statute was amended --

THE COURT: I am sure I am older and wiser, Mr. Tilden.

MR. TILDEN: Certainly wiser. In the early '80s we were trying cases over 2,400 bucks. If you won or lost you put in your fees for $4,100. The loser would come in and say, how can I owe $4,100 when the claim was only $2,400? It would happen down on the third floor of the King County Courthouse. It happens all the time. The notion that the repair costs more than the widget itself happens all the time. Ms. Kelley was promised something that was not delivered. All we want is for her to get it.

How much more time do I have?

THE COURT: Well --

MR. TILDEN: I have used it up?

THE COURT: Not quite, because I gave Mr. Rummage more

than he was due. Why don't you spend another three minutes making your point. But I need to tell you I have somebody behind the door waiting to plead this morning.

MR. TILDEN: I am with you. Let me make two points and I will sit down. I have said it before, the cases are fact intensive and they are fact driven. If you take the cases where no class is certified, you find a set of rules that look better for the defendants than they do for the plaintiff. If you take the cases where the class is certified you find a set of rules that are frankly very flexible.

Two good examples, the two we like best -- I don't know how to say the drug, but Caredizem -- the Caredizem CD litigation and the Live Concert Tickets litigation. The question on decertification isn't who is going to win or lose on the merits, it is given the claim what do we do here and what is the most efficient thing to do. These people will have, the class members, no remedy at all if they can't proceed here. We believe the law permits a remedy here.

Microsoft is requiring a direct connection between the CPA injury and the CPA damages. The State of Washington doesn't require that, and the Allen case rejected that 28 years ago nine to zip. Very directly. It's only three paragraphs. But they leave no doubt that the Court of Appeals was reversed.

The second point I would make is this: The unjust enrichment class action remains unaffected by any argument they have raised.

We can show all the elements of unjust enrichment. The damages are class wide. Newberg explains why. That is an easy proposition to handle. There is no reason that we can see why it is not the right remedy here or a correct remedy here.

The last point is this: I was going to talk some about WDDM today because it does highlight what is going on here. This is tab 6 in the Court's notebook. "We have confirmed that 915 will never be retrofitted with a WDDM driver, and therefore will never qualify --"

THE COURT: You have to slow down. Is that the first --

MR. TILDEN: I apologize, Judge. It is the yellow stick-em tab, at the very top of the pages.

THE COURT: Got it. Thank you.

MR. TILDEN: "We have confirmed that the 915 will never be retrofitted with a WDDM driver, and therefore will never qualify for a Vista Logo." This is in November of 2006. In November of 2006 915s were in the market being sold with Vista Capable logos.

The e-mail talks about what happens on Vista release. "On Vista release these things will not be Vista but they are being sold as Vista today. The non WDDM computers in our class cannot be upgraded at all unless by upgrade Microsoft means throw the computer away and buy a new one." If Ms. Kelley's remedy results in that occurring we believe it is fair.

Here is the last one and I will sit down. It is the yellow

tab 3. Mr. Rummage ended by pointing out that he did not believe any deception occurred; we have no evidence of deception at all; the summary judgment should be granted. Jim Allchin is a -- was, he retired, a big wig at Microsoft. Microsoft had a senior leadership team, three people were on it, Gates, Ballmer and Allchin. He was the group vice-president for Windows, Home and Business from '99 to 2005. They changed his title, he kept the same job. He was way up at the top.

This is what Mr. Allchin said about the Vista Capable plan.

THE COURT: Where are you reading now?

MR. TILDEN: The yellow stick-em three. "I believe we are going to be --"

THE COURT: Wait a second. The yellow stick-em three behind tab what?

MR. TILDEN: Behind tab three too. That is just a coincidence.

THE COURT: Go ahead.

MR. TILDEN: "I'm sorry to say that I think this plan is terrible and it will have to be changed." It wasn't. "I believe we are going to be misleading customers with the Capable program. OEMs will say a machine is Capable and customers will believe that it will run all the core Vista features. The fact that Aero won't be there ever for many of these machines is misleading to customers." It is an admission. It is directly from the top. None of the antitrust cases contains a piece of evidence like

that one. That is all I have.

THE COURT: Mr. Rummage, I have to keep you short.

MR. RUMMAGE: Two and a half minutes.

THE COURT: Two.

MR. RUMMAGE: You are a hard bargainer. I don't have any leverage though.

The first point, your Honor. This is a theme that runs through Mr. Tilden's presentation, this is a cubic zirconium that they called a diamond. Two things about that. First of all, I threw down the gauntlet and I said, show me what they told the public during this time period that wasn't true. Still silence on that point. Instead what we get is Mr. Allchin, the quotation he just read to the Court. And Mr. Tilden said, this plan is terrible, it will have to be changed and it wasn't. I invite the Court to read the Totton declaration. What Mr. Tilden said is flat not true.

The plan was changed. It was changed in particulars that everyone in this Court knows about, most notably it introduced the Premium ready concept which was then part of the marketing program.

The important thing about this cubic zirconium/diamond thing is to remember this: This is the Windows Vista Capable program. This is a program where everybody who participated in it bought an XP PC, not a Windows Vista PC. And your Honor knows from reading the papers that the fraction of people who will ever move

off that XP PC, to whom these distinctions that Mr. Tilden speaks so passionately about will ever matter, is minuscule. Minuscule. And yet this defective class action that Mr. Tilden wants to proceed will award damages to every one, to the 90 plus percent of people who never cared, who never would have upgraded, who were exactly like Ms. Kelley, all on the say so of Dr. Leffler that there was some increment of price inflation. A nickel? A dime? A buck? I don't know. But there was something in there.

Your Honor, we also have to remember this is about a class. So their burden is not to show that somebody paid more. Their burden to get a class certified is to show that they have a way of proving that everybody paid more.

When Mr. Tilden says to your Honor everybody in this courtroom knows that 19.4 million of these non WDDM compliant PCs dumped on the market is going to decrease the price. I don't know that. I certainly don't know that it is going to affect the price of a particular PC in Tallahassee or Corpus Christi, the city that Mr. Tilden referred to, or Charleston or anywhere else sold at a Best Buy where the Best Buy marketing strategy is to perhaps drive people to Premium ready PCs. None of us know that, because the plaintiffs didn't bother to give your Honor any hint of a way to find it out.

And finally, your Honor, with respect to the cases, one important point is that the McLaughlin case that Mr. Tilden said would go differently today. He misses the point. There are two

separate discussions in McLaughlin, one about reliance, one about lost causation. We don't rely on the discussion about reliance because we always knew your Honor had ruled that was not an element under the CPA. We rely on the discussion about lost causation, which is as good today as it was then.

And Allen, your Honor, is a case that does not involve people asking for harm to be proven -- or I shouldn't say harm, injury to be proven through one type of harm and damages proven through another. In that case, Allen, what happened is the plaintiffs proved that they were induced to buy worthless hand. And so the question is do they get, quote, damages, or do they get, quote, restitution. Both of them relating to the same harm, that is the worthless land that they bought.

Here the plaintiffs say, we were harmed because we paid an extra nickel, dime, whatever, we don't know what, and whether or not we were ever going to upgrade to Windows Vista, whether or not we were ever going to change our PCs from XP, whether or not our computer does everything we wanted. Just like Ms. Kelley said, my computer, t is not a cubic zirconium, it does everything I bought it to do, but I want a $500 check anyway so I can buy a new PC.

And then finally, your Honor, unjust enrichment. Your Honor correctly noted in the class certification order that the measure of unjust enrichment was whether Microsoft had earned increased or sustained income as a result of this. In other words, your

Honor was not looking for the number that was the same number we would have earned even without the alleged deception. And Dr. Leffler, to his credit, said, I can't compute that number. Nobody knows that number. And so the number that Mr. Tilden is advocating is simple math. It is every nickel that everybody in the class paid for an XP license, people who are today sitting at their computers using that XP operating system. And, again, harkening back to the first point I made, the vast majority of whom never had any intention -- over 90 percent never had any intention of upgrading to Windows Vista.

So, your Honor, this is a meat hook that the plaintiffs are trying to use in cases that should be dealt with by a scalpel, if at all. This is a situation where the plaintiffs have -- Mr. Tilden said, this is not an expert driven case. This is a cases that is driven entirely by experts and lawyers who have dreamt up an issue that would not have been dreamt up by any user of these PCs, who got what they wanted, got what they paid for and are using it today.

So we would ask the Court to grant summary judgment and decertify the class. Thank you, your Honor.

THE COURT: Thank you, counsel, for your arguments. I will write you an opinion about this. You will not see it for at least two and a half weeks. So not next week, not the week after, you will see it the following week. And I do know that have you other stuff teed up for me.

Anything else that I can help you with today?

MR. RUMMAGE: No, your Honor.

MR. TILDEN: Nothing here, your Honor.

THE COURT: If I could get everyone to move their things quickly, I have another hearing that I have kept waiting.

(Adjourned)

CERTIFICATE

I, Barry L. Fanning, Official Court Reporter, do hereby certify that the foregoing transcript is true and correct.

S/Barry L. Fanning

_____
Barry L. Fanning